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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

CLAUDE DELL GIPSON,

Defendant and Appellant.

A100337

(Solano County  
Super. Ct. Nos. 185386, 199859)

**I. INTRODUCTION**

Appellant Claude Dell Gipson was placed on three years' probation after pleading no contest to vehicle theft (Solano County Super. Ct. No. 185386). The court ordered Gipson to pay a \$200 restitution fine pursuant to Penal Code section 1202.4.<sup>1</sup> Two years later, a jury found Gipson guilty of inflicting corporal injury upon a cohabitant (Solano County Super. Ct. No. 199859). The court revoked Gipson's probation in case No. 185386 and, at a consolidated sentencing hearing, imposed a restitution fine of \$800 pursuant to section 1202.4 for both cases and an additional \$800 restitution fine pursuant to section 1202.45, again for both cases.

Appellant contends that the two \$400 restitution fines relating to case No. 185386 constituted an unauthorized sentence. The Attorney General concedes sentencing error. We agree and therefore modify the judgment to correct the error.

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<sup>1</sup> Unless otherwise indicated all statutory references are to the Penal Code.

## **II. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND**

### **A. *Case No. 185386***

On September 1, 2000, appellant pleaded no contest to vehicle theft. (Veh. Code, § 10851, subd. (a).) On October 3, 2000, the court imposed a suspended three-year sentence and placed appellant on probation. The court ordered appellant to pay a \$200 restitution fine pursuant to section 1202.4. The court temporarily revoked probation on October 23, 2000, and conducted a formal revocation hearing on March 20, 2001. Thereafter, the court found appellant violated probation and ordered probation reinstated with modifications to the original terms.

### **B. *Case No. 199859***

On August 8, 2002, a jury found appellant guilty of inflicting corporal injury upon a cohabitant. (§ 273.5, subd. (a).) Following the guilty verdict, appellant admitted a violation of probation with regard to case No. 185306.

### **C. *Sentencing***

A consolidated sentencing hearing was conducted on September 10, 2002. The court sentenced appellant to a four-year term for inflicting corporal injury upon a cohabitant, and a concurrent middle two-year term for vehicle theft. The court also imposed an \$800 restitution fine pursuant to section 1202.4, subdivision (b), and an additional \$800 restitution fine pursuant to section 1202.45, and indicated that these fines pertained to both case Nos. 185386 and 199859. On September 11, 2002, appellant filed a timely notice of appeal.

## **III. DISCUSSION**

The court imposed fines pursuant to sections 1202.4, subdivision (b) and 1202.45 that covered both cases, and intended that one-half of each fine be attributable to each of the two cases. This appeal pertains only to the two \$400 fines relating to case No. 185386. We agree with appellant that those fines were improper.

Section 1202.4, subdivision (b) requires the court to impose a restitution fine in every case in which a person is convicted. That section states: “In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution

fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record.” (§ 1202.4, subd. (b).) Here, at the sentencing hearing on October 3, 2000, when probation was initially granted, the court imposed a \$200 restitution fine. A restitution fine imposed at the time of probation survives the revocation of probation. (*People v. Chambers* (1998) 65 Cal.App.4th 819, 820 (*Chambers*).)

In *Chambers*, the defendant had been placed on probation and ordered to pay a \$200 restitution fine. (*Chambers, supra*, 65 Cal.App.4th at p. 821.) Four years later, the trial court revoked the defendant’s probation and sentenced her to a prison term. (*Ibid.*) The trial court also imposed a \$500 restitution fine. (*Ibid.*) The *Chambers* court reversed the sentence and held that there is “no provision for imposing a restitution fine after revocation of probation.” (*Id.* at p. 822.) A conviction is required in order to trigger the imposition of a restitution fine, the court held. (*Id.* at p. 823.)

Just as in *Chambers*, the trial court in this case erred by imposing a new restitution fine pursuant to section 1202.4, subdivision (b) after it revoked appellant’s probation in case No. 185386. The trial court was not authorized to impose an additional fine or increase the original \$200 fine that was imposed when appellant was sentenced the first time. (See *Chambers, supra*, 65 Cal.App.4th at p. 823.) Appellant’s failure to object to the improper fine at the sentencing hearing did not waive the issue for appeal. (*Ibid.*) When a trial court exceeds its statutory authority, failure to object does not serve as a waiver of the issue. (*Ibid.*)

Furthermore, when a defendant’s sentence includes a period of parole, as was the case here, section 1202.45 requires the imposition of an additional restitution fine. However, that section requires the restitution fine to be identical to that imposed pursuant to section 1202.4.<sup>2</sup> Therefore, the \$400 restitution fine imposed pursuant to section 1202.45 in case No. 185386 should have been a \$200 fine as well.

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<sup>2</sup> Section 1202.45 states: “In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing

#### IV. DISPOSITION

The judgment is modified by striking the \$400 fine imposed pursuant to section 1202.4, subdivision (b) in case No. 185386. The \$200 restitution fine that was previously imposed pursuant to section 1202.4, subdivision (b), if not still in force, is reinstated. Furthermore, the \$400 fine imposed pursuant to section 1202.45 in case No. 185386 is reduced to the amount of \$200. The judgment is otherwise affirmed.

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Haerle, J.

We concur:

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Kline, P.J.

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Ruvolo, J.

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the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. This additional restitution fine shall be suspended unless the person's parole is revoked."